

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

75-7497

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-7497

FRIENDS OF THE EARTH, FRIENDS OF THE EARTH NEW YORK BRANCH, NATURAL
RESOURCES DEFENSE COUNCIL, INC., SIERRA CLUB, CITIZENS FOR A BETTER
NEW YORK, CITIZENS FOR CLEAN AIR, INC., COMMITTEE FOR BETTER TRANSIT,
INC., ENVIRONMENTAL ACTION COALITION, INC., HARLEM VALLEY TRANS-
PORTATION ASSOCIATION, INSTITUTE FOR PUBLIC TRANSPORTATION, NYC
CLEAN AIR CAMPAIGN, NEW YORK STATE TRANSPORTATION COUNCIL, NORTH
EAST TRANSPORTATION COALITION, WEST VILLAGE COMMITTEE, DAVID SIVE,
PAUL DUBRUL,

Plaintiffs-Appellants,

—v.—

HUGH CAREY, ABRAHAM BEAME, DAVID L. YUNICH, MICHAEL J. COBB, ALFRED
EISENPREIS, MOSES L. KOVE, ELINOR GUGGENHEIMER, ROBERT A. LOW,
MICHAEL LAZAR, JOHN ZUCCOTTI, MORRIS TARSHIS, PAUL O'DWYER, J.
DOUGLAS CARROLL, JR., WILLIAM J. RONAN, THEODORE KARAGHEUZOFF, P.E.,
JAMES MELTON, OGDEN REID, STATE OF NEW YORK, CITY OF NEW YORK,
NEW YORK CITY TRANSIT AUTHORITY,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

**BRIEF FOR DEFENDANT-APPELLEE
NEW YORK CITY TRANSIT AUTHORITY**

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DEC 10 1975

SECOND CIRCUIT

2

TABLE OF CONTENTS

	PAGE
Issue Presented	1
Statement of the Case	2
Proceedings Below	2
The Facts	3
Background of the Case	6
POINT I—	
The District Court properly exercised its discretion in declining to issue a preliminary injunction	8
POINT II—	
The complaint fails to state a cause of action against the Transit Authority or its Chairman and was properly dismissed as to them	10
A. There is no authority in either the Act or the Plan to regulate the transit fare	10
B. The Transit Authority and its Chairman were not named in any way in the original complaint, nor were they given any notice in the "amended" complaint of any actions allegedly giving rise to a claim against them	12
POINT III—	
Neither the Transit Authority nor its Chairman received proper statutory notice 60 days prior to the commencement of suit as required by 42 U.S.C. §1857h-2(b). Further, there is no jurisdiction under 42 U.S.C. §1857h-2(e) for the Court to grant the relief sought	13

A. In an action against the Transit Authority brought pursuant to the citizens suit provision of the Act to enjoin a fare increase, the Transit Authority must receive the 60-day notice required in that provision (42 U.S.C. §1857h-2(a), (b))	13
B. Plaintiffs cannot maintain this action against the Transit Authority pursuant to the savings clause of the Act (42 U.S.C. §1857h-2(e))	16
CONCLUSION	18

TABLE OF AUTHORITIES

CASES:

<i>Abrams v. New York City Transit Authority</i> , 48 AD 2d 69 (1st Dept. 1975)	13
<i>Brown v. EPA</i> , Dkt. No. 73-3306 (9th Cir. August 15, 1975)	11n
<i>City of Highland Park v. Train</i> , 519 F.2d 681 (7th Cir. 1975)	17
<i>Conley v. Gibson</i> , 355 U.S. 41 (1957)	12
<i>Conservation Society of Vermont v. Secretary</i> , 508 F. 2d 927 (2nd Cir. 1974)	17
<i>Delaware v. Hodson</i> , 265 F. Supp. 308 (D. Del. 1967)	17
<i>District of Columbia v. Train</i> , Dkt. No. 74-1013 (D.C. Cir. October 28, 1975)	11n, 15
<i>Dopp v. Franklin National Bank</i> , 461 F. 2d 873 (2d Cir. 1972)	10
<i>Flushing v. New York City Transit Authority</i> , N.Y. L.J. October 22, 1971 (Sup. Ct., Kings Co.)	13

	PAGE
<i>F.O.E. v. EPA</i> , 499 F. 2d 1118 (2d Cir. 1974)	11
<i>F.O.E. v. Wilson</i> , 74 Civ. 3656 (S.D.N.Y. September 10, 1974)	16
<i>F.O.E. v. Wilson</i> , 389 F. Supp. 1394 (S.D.N.Y. 1974)....	8
<i>Glen v. Rockefeller</i> , 61 Misc 2d 942, aff'd, 34 AD 2d 930 (1st Dept. 1970)	11n, 13
<i>Holtzman v. Schlesinger</i> , 361 F. Supp. 544 (E.D.N.Y. 1973), rev'd on other grounds 484 F. 2d 1307 (2d Cir. 1973)	12-13
<i>Maryland v. EPA</i> , Dkt. No. 74-1007 (4th Cir. September 19, 1975)	11n
<i>Movement Against Destruction v. Volpe</i> , 361 F. Supp. 1360 (D. Md. 1973), aff'd, 500 F. 2d 29 (4th Cir. 1974)	17
<i>NRDC v. Callaway</i> , Dkt. No. 75-7048 (2nd Cir. September 9, 1975)	17
<i>NRDC v. Train</i> , 510 F. 2d 692 (D.C. Cir. 1975)	17
<i>Pennsylvania v. EPA</i> , 500 F. 2d 246 (3rd Cir. 1974)....	11n
<i>Pinkney v. Ohio EPA</i> , 375 F. Supp. 305 (N.D. Ohio 1974)	17
<i>Stamicarbon, N.V. v. American Cyanamid Company</i> , 506 F. 2d 532 (2d Cir. 1974)	9
<i>Stark v. New York Stock Exchange</i> , 466 F. 2d 743 (2d Cir. 1972)	10
<i>Walsh v. Metropolitan Transportation Authority</i> , N.Y. L.J., August 17, 1971 (Sup. Ct. Kings Co.)	13

STATUTES and RULES:

Clean Air Act, 42 U.S.C. §1857 <i>et seq.</i>	<i>passim</i>
Fed. R. Civ. P. 15(a)	12
Fed. R. Civ. P. 21	12
Fed. R. Civ. P. 65	17
N.Y. Public Authorities Law §1201	13
N.Y. Public Authorities Law §1205	11, 14
28 U.S.C. §1651	17
40 C.F.R. §54.3	14

OTHER AUTHORITIES:

Conference Report No. 91-1783, 91st Cong. 2d Sess. (1970)	15
Moore's Federal Practice	12, 17-18
43 C.J.S. <i>Injunctions</i> §118	11n

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Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLEE NEW YORK CITY TRANSIT AUTHORITY

Issue Presented

Whether the District Court properly exercised its discretion in denying a motion to preliminarily enjoin a transit fare increase and dismissing the complaint as to the New York City Transit Authority for failure to state a cause of action, where:

- (a) Such a fare increase does not violate either the Clean Air Act (42 U.S.C. §1857; *et seq.*) or the Transportation Control Plan* adopted thereunder;
- (b) Even if the fare increase were a violation, the alleged violator did not receive notice as required by 42 U.S.C. §1857h-2(b) of the Clean Air Act;
- (c) The New York City Transit Authority was not named in any way in the original complaint, and an "amended" complaint, filed after oral argument and without the Court's permission, did not provide any notice to the Transit Authority of the actions which gave rise to the asserted claim.

Statement of the Case

Proceedings Below

Plaintiffs appeal from an order of the District Court (DUFFY, J.) entered on August 28, 1975, which denied their motion for a preliminary injunction restraining the transit fare increase and ordering the implementation of the Plan and dismissed the "amended" complaint as to the newly named defendant New York City Transit Authority (hereinafter, the "Transit Authority"). Plaintiffs had also made a motion for summary judgment which the Court denied *sua sponte*, and which is not a subject of the appeal herein.

On September 8, 1975, plaintiffs' motion in this Court for an expedited appeal was denied.

Plaintiffs are suing under the citizens suit provision of the Clean Air Act, 42 U.S.C. §1857h-2(a). In the original complaint, filed on October 11, 1974, the named defendants

* The New York City Metropolitan Area Air Quality Implementation Plan Transportation Controls (hereinafter, "the Plan").

included the State and City of New York and various officials, including David L. Yunich, as Chairman of the Metropolitan Transportation Authority. In an amended complaint, filed without leave of Court on August 12, 1975, after oral argument had already been heard, plaintiffs attempted to add as defendants the Transit Authority and David L. Yunich as Chairman of the Transit Authority.

Subsequently, in September, 1975, defendants Beame, Codd, Eisenpreis, Kove, Guggenheimer, Low, Lazar, Zuc-cotti, Tershish, O'Dwyer, Karagheuzoff and the City of New York moved in the District Court to dismiss the complaint for failure to state a claim upon which relief could be granted, or, alternatively, to empanel a three-judge court, on the ground that 42 U.S.C. §1857c-5 and the Plan adopted thereunder are unconstitutional. This motion is pending in District Court.

The Facts

The Transportation Control Plan was adopted by the State and submitted for approval by the U.S. Environmental Protection Agency (hereinafter the "EPA"), on January 31, 1972. The plan was approved by the EPA, with certain revisions. See 40 C.F.R. 52-1673 *et seq.* The Plan provides for different strategies¹ to achieve requisite air quality standards² and requires by its terms the taking of certain action by various state and local bodies and officials.

¹ Strategies are designated as primary maintenance, contingency or secondary, depending on their use in the Plan.

² Primary standards are those "the attainment of which in the judgment of the Administrator . . . are requisite to protect the public health" 42 U.S.C. §1857c-4(b)(1). A secondary standard is one which "in the judgment of the Administrator . . . is requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air." §42 U.S.C. §1857c-4(b)(2).

Alleging violations of certain of these strategies, plaintiffs served notices of violation on the originally named defendants, pursuant to 42 U.S.C. §1857(h)-2 (A-95-129).^{*} A notice of violation, dated August 5, 1974, which appears to be a duplicate of those sent to all other alleged violators, was sent to David L. Yunich as Chairman of the Metropolitan Transportation Authority (hereinafter, the "MTA"). No notice was ever sent to either the New York City Transit Authority (A-167), which is a separate and distinct corporate entity from the MTA, or to Mr. Yunich as the Transit Authority's Chairman (A-167).

One strategy directly requiring action by the Transit Authority upon which plaintiffs rely is B-5: Expanded Use of Express Buses and Exclusive Bus Lanes. In order for the State to comply with its obligations under this strategy to submit a bus master plan for the New York State portion of the tri-state Air Quality Control Region, it needs the cooperation of the Transit Authority and other mass transit operators. The Transit Authority has no jurisdiction over the establishment of exclusive bus lanes. It has, however, expanded the use of express buses since the adoption of the Plan. This strategy is now the subject of an EPA order consented to by the State (A-164).

In August, 1975, the Board of the Transit Authority voted to increase the fare from \$.35 to \$.50, effective September 1, 1975. As the Transit Authority has no taxing power, the fare is virtually its sole means of raising revenue. Its other income is received through loans and subsidies from the federal, state and city governments. Because of the City's financial difficulties it had advised the Transit Authority that it would be unable to continue the same level of such loans and grants (A-164).

^{*} Numbers in parentheses, unless otherwise indicated, refer to the pages of the Appendix.

Even with its current level of other income, the Authority's expenses surpass revenues. The cost of providing a subway ride just before the increase was double the \$.35 fare. Thus, a fare increase was mandated by current needs (A-163-66).

Under the Plan, if fully implemented, income may be produced from the imposition of tolls on formerly free bridges (Plan, Strategy B-7). Such income, if ever realized, flows to the City and neither the strategy itself nor the accompanying "legal analysis" required that any of these funds be earmarked for the Transit Authority (Plan, pp. A-37, C-9, 10). In discussing the economic feasibility of the strategy it is merely stated that a toll surplus "would be available for mass transportation or other high priority programs" (Plan, p. 7-23). The only mention of earmarking was a suggestion that to do so "for mass transit to the affected boroughs [opposed to the imposition of tolls], emphasizing service improvements, might sweeten the appeal of the project" (Plan, p. A-37). The "possible" subsidy package in the Plan (A-156) is even more speculative. Although not mandated by the plan, the earmarking of such funds for transit improvements is cited in plaintiff's violation notice (A-111). Similarly, no other strategy in the Plan specifically requires the direction of funds to the Authority.

On September 27, 1975, after the entry of the order appealed from, the EPA issued an order to the Mayor of the City of New York requiring the City to implement Strategy B-7: Tolls on the East and Harlem River Bridges. This order provides that by July 14, 1977, the Mayor establish such tolls and allocate the net revenues collected to subsidize or reduce mass transit fares in the New York portion of the New Jersey-New York-Connecticut Interstate Air Quality Control Region. Although the Tran-

sit Authority would welcome these funds, their payment in July 1977, will hardly aid the Transit Authority's present fiscal crisis. Moreover, the Mayor has indicated that he will oppose the implementation of this strategy. Thus, any funds forthcoming from such tolls are at this time speculative. Even if such funds are forthcoming, toll and fare revenues are not alternative sources of funding; both are needed and can be well utilized.

The problem incident to the fare increase which plaintiffs feared was a 10% loss in ridership on the assumption that "[o]nly because these strategies are not implemented, the fare increase would have the adverse effect of increasing the number of vehicles entering Manhattan" (Br., p. 15).

Although, as defendants argue, there is no authority in the Act or Plan for holding all things constant until the Plan is fully implemented, such is unnecessary in this case even if permissible. Defendants contended that it did not follow "that any increase in fare would, under present economic conditions, lessen ridership to any material degree" (A-167). The figures now available since the increase indicate that this argument was well founded. Average loss of rapid transit ^{ridership} (approx. 3%) has remained, apart from the first month following the increase, basically the same as in the immediately preceding months. The plaintiffs' projection of a 10% decline in ridership (Br. p. 14) has not materialized.

Background of the Case

An action was commenced by plaintiffs requesting this Court, pursuant to 42 U.S.C. §1857h-5, to review the EPA Administrator's approval of the Plan on the grounds that the Plan was "too vague" and did not comply with the requirements of §110(a)(2)(b). The petition was granted to the extent that the Administrator was required to further

explain his determination regarding three points; in all other respects it was denied. 499 F.2d 1118 (2nd Cir. 1974).

Plaintiffs unsuccessfully challenged certain assumptions allegedly made by the Administrator in approving the parking ban strategy. As to one of them, regarding transit fares, this Court held that the Administrator did not act

"unreasonably in approving a plan that did not provide for maintaining current mass transit fares" [since] "the plan does not aim at attracting riders to mass transit; it admits that there is no sure way to do that. Rather it aims at compelling them to use other modes of travel besides private automobile"

No order was issued as to actual enforcement of the Plan as the District Court properly has such jurisdiction.

There was no revision of the Plan, following this decision, to accommodate the possibility of a fare increase, pursuant to 42 U.S.C. §1857c-5(a)(2)(H)(ii) which provides that a Plan may be revised by the EPA Administrator whenever he finds:

"on the basis of information available to him that the plan is substantially inadequate to achieve the national ambient air quality primary or secondary standards which it implements."

Thereafter, plaintiffs commenced suit in District Court, to which neither the Transit Authority nor Yunich as its Chairman were parties, for declaratory and injunctive relief compelling the defendants to perform all duties required by the Plan in accordance with implementation schedule deadlines. The City and defendant Yunich, as Chairman of the Metropolitan Transportation Authority, moved to dismiss on the ground, *inter alia*, that they had not received separate 60-day notices of violation, as

alleged "violators", required by 42 U.S.C. §1857(h)-2(b). The motion was granted by the District Court (WEINFELD, J.) for failure to comply with 42 U.S.C. §1857(h) on September 10, 1974 (74 Civ. 3656). No appeal was taken from this order.

The present action was commenced in October, 1974 for declaratory and injunctive relief to enforce the Plan. Because of the technical issues involved in enforcing the Plan, and because the Plan was being revised at the time of the hearing, the motion was denied with leave to renew when the position of the EPA became clarified, at which time it was stated that the EPA should be added as a defendant to oversee enforcement. 389 F. Supp. 1394 (S.D.N.Y. 1974).

This motion for preliminary injunction was renewed before Judge DUFFY by order to show cause returnable July 30, 1975. In this proceeding, plaintiffs requested that the Transit Authority and its Chairman be added as parties and moved to enjoin the Transit Authority from increasing the transit fare until the Plan was fully implemented. Without waiting for the Court to rule on the motion, plaintiffs amended their complaint by naming the Transit Authority as a party. The District Court's denial of the injunctive relief sought and the dismissal of the complaint as against the Transit Authority are the subject of this appeal.

POINT I

The District Court properly exercised its discretion in declining to issue a preliminary injunction.

"It is well established that a party wishing to establish its right to a preliminary injunction must demonstrate either a probability that it will succeed on the merits

coupled with a threat of irreparable injury, or a balance of hardship decidedly in its favor together with a serious question regarding the merits of the underlying action." *Stamicarbon, N.V. v. American Cyanamid Company*, 506 F. 2d 532 (2d Cir. 1974). The plaintiffs fail to meet either of these tests.

The plaintiffs' likelihood of success on the merits, or even a serious question concerning the merits as against the defendant Transit Authority, is highly doubtful, as discussed fully under Point II. Further, not only did the plaintiffs fail to demonstrate to the District Court that they would suffer irreparable harm or that there was a balance of hardship decidedly in their favor, it is the defendant Transit Authority which would be irreparably damaged by the issuance of a preliminary injunction. The Senior Executive Officer of the Transit Authority, in an affidavit submitted to the District Court (A163-168), cited the grave financial crisis facing the Authority and the need for an immediate fare increase to meet its operating expenses, including payrolls. The fare increase was especially necessary in view of information from the City of New York, faced with its own fiscal difficulty, that it would no longer be able to continue its previous level of assistance to the Transit Authority (A-164); neither does the Plan provide for any funds to be provided for the operation of mass transit, discussed *infra* at pp. 5-6.

In the face of this, the plaintiffs blandly assert that this financial emergency should not have been considered on their application for a preliminary injunction against the fare increase because "[p]laintiffs expressly asked that any injunction be designed not to add a fiscal burden to the City, but that compliance should fall exclusively upon the Transit Authority and the State" (Br., p. 19). Plaintiffs also apparently argue that they did not have the burden

of showing that the proposed preliminary injunction was economically feasible (Br., p. 22). It is basic, however, that the movant has the burden of demonstrating to the District Court the propriety of a preliminary injunction. *Stark v. New York Stock Exchange*, 466 F. 2d 743 (2d Cir. 1972); *Dopp v. Franklin National Bank*, 461 F. 2d 873 (2d Cir. 1972).

POINT II

The complaint fails to state a cause of action against the Transit Authority or its Chairman and was properly dismissed as to them.

A. There is no authority in either the Act or the Plan to regulate the transit fare.

Plaintiffs argue that the fare increase should be enjoined because it is "unnecessary" and that an increase, not in itself a violation, would somehow "jeopardize the ultimate success" of the Plan while other violations allegedly existed. These are inaccurate assumptions.³ However, regardless of their accuracy, there is nothing in the Act or the Plan which imposes a duty on the Transit Authority to maintain any specific fare level, as plaintiffs concede (Br., p. 44), nor can such a requirement be read into the Plan. Indeed, one of plaintiff's objections to the EPA Administrator's original approval of the Plan was that the parking ban strategy was inadequate since the Plan made no provision for "maintaining current fares." In finding

³ Nothing in the Plan mandates that toll revenues go to the Transit Authority; in any event this strategy, not yet implemented, does not meet the Transit Authority's current financial needs (discussed more fully *supra*, at pp. 5-6).

Plaintiffs second argument is based on the assumption that transit ridership will go down 10%, somehow affecting travel patterns. As noted, however, this decline in ridership has not occurred. (*Supra* at p. 6).

that the EPA Administrator did not act unreasonably in approving the Plan despite the omission, this Court stated that the Plan "does not aim at attracting riders to mass transit; it admits that there is no sure way to do that. Rather, it aims at compelling them to use other modes of travel besides private automobile. . ." *Friends of the Earth v. EPA*, 499 F. 2d 1118, 1125 (2nd Cir. 1974).

Since this decision there has been no revision of the Plan by the EPA pursuant to 42 U.S.C. §1857c-5(a)(2) (H)(ii), which would have been the proper course, to accommodate the possibility of a fare increase if it were determined that an increase would affect any of the Plan's strategies.

Therefore, since only violations of the Plan are actionable, there is no authority for the Court to hold all external factors constant until the Plan is fully implemented.⁴

⁴ In addition, the plaintiffs seek, in the context of a lawsuit with the ostensible goal of enforcing the Plan, to accomplish what the EPA Administrator himself probably could not effect. In moving for an injunction, the plaintiffs sought to prevent the Board of the New York City Transit Authority from acting pursuant to New York Public Authorities Law §1205, in fixing the level of the fare. Under New York law, this is a legislative act. *Glen v. Rockefeller*, 61 Misc. 2d 942, 949 (Sup. Ct., N.Y. Co. 1970), *aff'd*, 34 A D 2d 930 (1st Dept. 1970). Traditionally, courts will not enjoin legislative acts. 43 C.J.S. *Injunctions* §118.

The power of the Administrator to direct the enactment of legislation (or, it would seem, to forbid the enactment of legislation) by a local agency has been held unauthorized by the Clean Air Act and the Commerce Clause, and probably violative of the Tenth Amendment. *District of Columbia v. Train*, Dkt. No. 74-1013 (D.C. Cir. October 28, 1975), *Maryland v. EPA*, Dkt. No. 74-1007 (4th Cir. September 19, 1975), *Brown v. EPA*, Dkt. No. 73-3306 (9th Cir. August 15, 1975). *But see Pennsylvania v. EPA*, 500 F. 2d 246 (3rd Cir. 1974).

- B. The Transit Authority and its Chairman were not named in any way in the original complaint, nor were they given any notice in the "amended" complaint of any actions allegedly giving rise to a claim against them.**

The original complaint did not name the Transit Authority in any way, save for one possible parenthetical reference having to do with express bus service (A-34). The rest of the twenty-three page complaint contained no allegation of any kind regarding action or lack of action by the Transit Authority, and clearly nothing relating to fares, despite plaintiffs' assertion in an affidavit that the "notice and complaint both reference duties under the Plan to be carried out by the MTA's sister corporation, the New York City Transportation Authority" (A-137).

As against the defendant Transit Authority, there is no basis on which the District Court could conclude that the complaint gives "fair notice of what the plaintiffs claim is and the grounds upon which it rests." *Conley v. Gibson*, 355 U.S. 41, 47 (1957).

Rule 15(a) of the Federal Rules of Civil Procedure does not authorize the addition of the Transit Authority as a party to this action as argued by plaintiffs (Br., p. 7). The original as well as the amended complaint contained no allegation regarding the level of transit fare. The plaintiffs sought to add the Transit Authority to an already-pending case in a transparent attempt to acquire a jurisdictional basis for injunctive relief. In any event, the proper procedure in order to add the Transit Authority as a party would have been by motion under Rule 21, and not by the mere service of an amended complaint. As succinctly stated: "Rule 21 governs the procedure for dropping or adding parties. Consequently a party may not be added by amendment of the complaint as of course." 5 Moore's Federal Practice § 15.07[2]. See also, *Holtzman v. Schles-*

inger, 361 F. Supp. 544, 552 (E.D.N.Y. 1973), rev'd on other grounds, 484 F.2d 1307 (2nd Cir. 1973).

POINT III

Neither the Transit Authority nor its Chairman received proper statutory notice 60 days prior to the commencement of suit as required by 42 U.S.C. §1857h-2(b). Further, there is no jurisdiction under 42 U.S.C. §1857h-2(e) for the Court to grant the relief sought.

- A. In an action against the Transit Authority brought pursuant to the citizens suit provision of the Act to enjoin a fare increase, the Transit Authority must receive the 60-day notice required in that provision (42 U.S.C. §1857h-2(a), b)).

Plaintiffs allege that a notice of violation with regard to strategy B-5 (express buses), which was allegedly served on the State and the MTA, eliminates the necessity of serving another "alleged violator," the Transit Authority, in an action under the citizens suit provision (42 U.S.C. §1857h-2) to enjoin the fare. However, such notice is required.

First, the Transit Authority is an independent public benefit corporation created pursuant to §1201 of the N.Y. Public Authorities Law. As such, it is not an agent of the State, the MTA or any other public body named as a defendant and allegedly served with notice. *Abrams v. New York City Transit Authority*, 48 A D 2d 69 (1st Dept. 1975); *Glen v. Rockefeller*, 61 Misc. 2d 942 (Sup. Ct., N.Y. Co. 1970), aff'd on op. below, 34 A D 2d 930 (1st Dept. 1970); *Walsh v. Metropolitan Transportation Authority*, N.Y.L.J. August 17, 1971 (Sup. Ct., Kings Co.); *Flushing v. New York City Transit Authority*, N.Y.L.J. October 22, 1971 (Sup. Ct., Kings Co.). Secondly, even if the Authority did

not require notice as to the alleged violation of the B-5 strategy, it requires such notice with regard to any attempted restraint of a fare increase under the Act.

The alleged notice of violation sent to Yunich as Chairman of the MTA clearly does not comply with the requirements of the statute to put the Transit Authority on notice that a fare increase, one year later, which was not a violation of any Plan strategy, is being challenged. With respect to the contents of a notice, 40 C.F.R. §54.3 states:

(b) Violation of standard, limitation or order. Notices to the Administrator, States, and alleged violators regarding violation of an emission standard or limitation or an order issued with respect to an emission standard or limitation, shall include sufficient information to permit the recipient to identify the specific standard, limitation, or order which has allegedly been violated, the activity alleged to be in violation, the person or persons responsible for the alleged violation, the location of the alleged violation, the date or dates of such violation, and the full name and address of the person giving the notice.

More importantly, as plaintiffs concede, the Transit Authority has "singular authority over the fare" pursuant to Public Authorities Law §1205 (Br., p. 39). It follows, therefore, that it is not "preferable" but necessary that the Transit Authority be a party and receive the 60-day notice to provide it, as the statute contemplates, with an opportunity to consider the objection and all the relevant factors.

Pursuant to 42 U.S.C. §1857h-2(b)(1)(a), "no action may be commenced under the Act prior to 60 days after the plaintiff has given notice of the violation (i) to the administrator, (ii) to the state in which the violation occurred,

and (iii) to any alleged violator of the standard, limitation or order."

Accordingly, although the state may have "primary responsibility" for implementing a Plan, each independent entity is responsible for compliance with the duties imposed thereunder, and a separate notice of violation must be given to the state and to the "alleged violator." This statutory mandate is supported by legislative history as well. See Conf. Rep. 91-1783, 1970 U.S. Code Cong. & Admin. News 5374, 5388.

Such an "alleged violator" is, *inter alia*, "any person . . . who is alleged to be in violation of . . . an emission standard or limitation . . ." 42 U.S.C. §1857h-2(a)(1), and a "person" includes both individuals and governmental bodies apart from the State.

The same result was reached by the Court with respect to 42 U.S.C. § 1857c-8(a)(1), which governs the enforcement proceedings brought by the Administrator and also requires notice to the "person in violation of the Plan and the state." The Court stated in *District of Columbia v. Train*, Dkt. No. 74-1013 (D.C. Cir. October 28, 1975), p. 283:

"This statute quite clearly contemplates that 'the person in violation of the plan' and 'the State in which the plan applies' may be two distinct entities. If Congress had expected that the states would be compelled, under pain of federal penalties, to enact and use their police power to enforce the plan, there would have been little point in requiring that two notices be given. The most 'efficient' enforcement from the standpoint of commitment of federal resources would be to order the state to take action against the violator and proceed against state officials under section 113(b) or (c) if they fail to act. Furthermore, this section clearly

indicates that of the two parties who are given notice, enforcement via compliance order or civil action is to be directed against the 'person in violation:—i.e., the actual polluter, rather than the state.'"

The Transit Authority has received no such notice and was not named as a party when this suit was commenced. Further, there is no provision for an allegation of actual notice to substitute for the clear statutory requirement, nor did the Authority receive any actual notice.

Finally, the plaintiffs were made aware that such separate notices were required after the dismissal of an earlier suit identical to the instant one, where the state had been served, for failure to comply with 42 U.S.C. § 1857h, because neither the City nor Yunich as Chairman of the MTA, against whom relief was sought, had received timely separate notices of violation. *F.O.E. v. Wilson*, 74 Civ. 3656 (S.D.N.Y. September 10, 1974).

Thus, although plaintiffs argue that they were not required in this case to send notice to "agents" of the State (as they attempt to designate Yunich and Beame, Mayor of the City of New York) but did so anyway (Br., p. 38), they in fact must do so. Similarly, they are required to provide the Transit Authority with this notice if they seek to enjoin the transit fare in a suit brought pursuant to the citizens suit provision of the Clean Air Act.

B. Plaintiffs cannot maintain this action against the Transit Authority pursuant to the savings clause of the Act (42 U.S.C. §1857h-2(e)).

After arguing that the statutory notice requirement of 42 U.S.C. § 1857h-2(a) was met as to the Authority, by service of a notice of violation on the State, the plaintiffs now assert that they are not seeking to bring in the Transit

Authority pursuant to that section at all. Rather, they allege that the action is brought under subsection (e) because the immediate need for joining the Transit Authority, a "party necessary to grant full relief," relates "solely to the fare increase, which was not a violation of any express strategies of the Plan" (Br., p. 44).

Plaintiffs contend that under this savings clause, the Court may, pursuant to Fed.R.Civ.P. 65, and the All-Writs Act, 28 U.S.C. § 1651, grant the preliminary injunctive relief they seek.

It has been held that the savings clause only allows suits arising under other than the Clean Air Act. *Pinkney v. Ohio EPA*, 375 F. Supp. 305 (N.D. Ohio 1974); *Movement Against Destruction v. Volpe*, 361 F. Supp. 1360, 1400 (D. Md. 1973), *aff'd*, 500 F. 2d 29 (4th Cir. 1974).

However, even where the courts have found that the 60-day notice requirement is not an absolute bar because suit could be brought pursuant to the savings clause in the Act, a separate jurisdictional basis is required to permit judicial intervention. *NRDC v. Callaway*, Dkt. No. 75-7048 (2nd Cir. September 9, 1975); *N.R.D.C. v. Train*, 510 F. 2d 692 (D.C. Cir. 1975); *Conservation Society of So. Vermont v. Secretary*, 508 F. 2d 927 (2nd Cir. 1974);⁵ See *City of Highland Park v. Train*, 519 F. 2d 681 (7th Cir. 1975).

No such jurisdictional basis is alleged in the instant case, and there is no such basis. Rule 65 is procedural; "the federal injunctive remedy is subject to jurisdictional and other regulatory statutes and judicial principles." The Rule itself "confers no jurisdiction." 7 Moore's Federal Practice § 65.03[3]. *Delaware v. Hodsdon*, 265 F. Supp.

⁵ The first three cases involve similar provisions in the Federal Water Pollution Control Act, 33 U.S.C. § 1365 *et seq.*

308 (D. Del. 1967). Similarly, "[i]t is settled that § 1651 cannot enlarge a court's jurisdiction, as established by the Constitution or by statute. Thus the purpose of § 1651 is to effectuate the established jurisdiction". 7B Moore's § 1651. Nor does such a jurisdictional base exist. As discussed more fully *supra* at p. 10, the plaintiffs do not state any cause of action against the Authority, since neither the Act or the Plan proscribes any fare increase. Therefore, plaintiffs cannot rely on § 1857h-2(e) to obtain the relief they seek.

CONCLUSION

The complaint fails to state a cause of action as against the defendant New York City Transit Authority or its Chairman; in any event, they did not receive the requisite statutory notice. Therefore, the District Court properly denied the motion for a preliminary injunction and dismissed the complaint. The judgment must be affirmed.

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Respectfully submitted,

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